IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,

Plaintiff,

vs.

PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual,

Defendants.

C.A. No. 2:00-2041

Judge Arthur J. Schwab

SUPPLEMENTAL RESPONSE OF WRS, INC. TO CONTENTIONS OF CHARLES von BERNUTH REGARDING VIABILITY OF A RECOUPMENT COUNTERCLAIM AND THE NECESSITY OF ACCEPTANCE OF HIS GUARANTY

AND NOW comes WRS, Inc., by and through its counsel, Thomas E. Reilly, Esquire, with the following Supplemental Response to the Contentions of Charles von Bernuth regarding the recoupment nature of his Counterclaim and the necessity of acceptance of his "Guaranty":

1. Defendant, von Bernuth, has asserted two arguments that WRS, Inc. has not addressed. This Supplement addresses those two arguments.

I. RECOUPMENT

Von Bernuth contends that the Counterclaim asserted at Case Number 03-1398, and apparently consolidated into this action by Judge Standish's Order of July 29, 2005, is not precluded by the confirmation of the WRS Chapter 11 Plan in August of 2004.

First, von Bernuth filed an Answer, Affirmative Defenses, and Counterclaim, at Docket Number 6 on October 29, 2003 in the action then pending at Case No. 03-1398.

The Disclosure Statement filed by WRS, Inc. in anticipation of its Plan of Reorganization in its bankruptcy proceeding was attached as Exhibit "1" to von Bernuth's pleading. Clearly, von Bernuth was aware of the WRS Chapter 11 proceedings and specifically that a Plan of Reorganization has been proposed.

Second, von Bernuth characterized his pleading as a Counterclaim. Von Bernuth did not designate any specific allegation or averment or demand for relief as a "Recoupment". Furthermore, the specific allegations do not constitute a "Recoupment".

Although captioned as a Counterclaim, the introductory language to the pleading states as follows:

> And now comes Defendant, Charles von Bernuth, by and through his counsel, Attorney John W. Gibson, and states the following Cross-Claim against Defendant, Plaza Entertainment, Inc., a corporation. (Introductory paragraph to von Bernuth's Counterclaim, page 1, Doc# 6, No 03-1398)

Von Bernuth's demand for relief did not seek damages on his own behalf against WRS. Rather, with respect to WRS, von Bernuth asked:

> That the Plaintiff be required to account for all funds received through the sale of videotapes of any film in either the Plaza Library or the Fabor Library, including the Hemdale Library titles and to pay the owners of the respective titles whether it is Plaza or Faber any gains or profits derived from Plaintiff from its infringement of copyright or such damages as shall appear proper within the provisions of the copyright statutes together with the costs of this action and reasonable attorney's fees. (Demand for Relief, von Bernuth Answer, Affirmative Defenses and Counterclaim, Doc.#6, No 03-1398)

In Paragraph 10 of von Bernuth's Answer, von Bernuth describes the manner in which American Happenings, Inc. assigned its rights in the Hemdale Library to Faber International Films, Inc. and that Faber contracted with Plaza Entertainment, Inc. to sell its films. Von Bernuth asked for an accounting and payment of money allegedly owed to

Plaza and Faber for copyright infringement by WRS. There is no allegation in von Bernuth's pleading to claim that von Bernuth's copyrights were infringed or that he had any other direct interest in any of the copyrights for which von Bernuth demanded that WRS account in his Counterclaim. The only other allegation contained in the Counterclaim that pertains to monetary relief for von Bernuth is the allegation that von Bernuth loaned $130,000.00 to Plaza Entertainment, Inc. (von Bernuth's Counterclaim, Paragraph 11, Doc # 6, No 03-1398). With respect to those damages, von Bernuth sought to claim $130,000.00 "from any award made to Plaza on any counterclaim in this action". Accordingly, if, in fact, a demand for recoupment could survive the preclusive effect of the confirmation of a Chapter 11 Plan, the allegations made by von Bernuth in his "Counterclaim" do not constitute a "claim for recoupment".

"A recoupment is the setting up of a demand arising from the same transaction as the Plaintiff's claim or cause of action strictly for the purposes of abatement or reduction of the claim… This doctrine in justified on the grounds that where the creditor's claim against the debtor arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim against the credit rather than mutual obligation and application of limitations set up in bankruptcy would inequitable." Cohen v. Goldberg, 542 Pa. 201, 720 A.2d 1028 (1998). Federal Courts have consistently held that the same transaction requirement must be narrowly interpreted. In re: B&L Oil Co., 782 F.2d 155 (10^{th} Cir. 1986). In Pennsylvania, recoupment must grow out of the "identical transaction" that furnishes the Plaintiff's cause of action. Household Consumer Discount Co. v. Vespaziani, 490 Pa. 209, 415 A.2d 689 1980). For example, securities laws violation and solicitation that induced the purchase of a condominium could not be asserted as a recoupment in an action to foreclose a mortgage that financed the purchase because the claims did not rise from the mortgage creation itself. Mellon Bank, N.A. v. Pasqualis-Politi, 800 F.Supp 1297 (W.D. Pa. 1992).

Von Bernuth alleges a right to payment, based upon WRS' alleged infringement of copyrights of Plaza and Faber, not from a violation of the Services Agreement. WRS claims arise from Plaza's failure to pay for services rendered by WRS. Accordingly, von Bernuth's claims do not arise from the same transaction or occurrence as gave rise to the WRS claim.

More importantly, in order to assert a "recoupment" von Bernuth would have to be the party entitled to the relief requested. Here, von Bernuth merely asks for an accounting and payment to Plaza and Faber of funds allegedly owed as the result of "copyright infringement" as distinguished from funds collected in the course of business between WRS and Plaza. The rights von Bernuth sought to assert against WRS in the "Counterclaim" were not his own but those of Plaza and Faber. Accordingly, von Bernuth's pleading fails to allege a basis for "recoupment."

The other basis for the alleged Counterclaim is the $130,000.00 loan that von Bernuth alleges he made directly to Plaza. Von Bernuth does not assert this claim against WRS but as a "Crossclaim" against Plaza. Clearly, von Bernuth's pleading does not assert a "Counterclaim" in the nature of a recoupment against WRS. Accordingly, von Bernuth's "Counterclaim" was not a recoupment, which could survive the Chapter 11 reorganization confirmation. Therefore, the argument that von Bernuth's Counterclaim was not determined by the Confirmation Order is without merit.

II. ACCEPTANCE OF THE GUARANTY

Von Bernuth argues that the "Guaranty" contained in the provisions of the Services Agreement never became effective because he did not receive "Notice of Acceptance". Pennsylvania law has stated that a guaranty is not effective until notice of its acceptance is given. Columbia Baking & Manufacturing Co. v. Schisler, 35 Pa.Super 621, 1908 ___ A.2d ___ 1908. In this context, the offer of the guaranty is not binding until accepted by the other party. Evans v. McCormick, 167 Pa. 247, 31 A. 563 (1895). However, when the guaranty and the underlying obligation which is the subject of the guaranty are contemporaneous no notice of acceptance is required. Spitzer v. Buten, 303 Pa. 572, 154 A. 917 (1931); Segal v. Bailey, 252 Pa. 231, 97 A. 401 (1916); Woods v. Sherman, 71 Pa. 100, 29 Legal Int. 260 (1872).

Von Bernuth's promise to guaranty Plaza's debt to WRS was contained in the Services Agreement, executed both by Plaza, as principal, and by von Bernuth as guarantor. Von Bernuth's guaranty undertaking was contemporaneous with promises of Plaza that gave rise to the debts guarantied. Consequently, the guaranty language in the Service Agreement was not an offer to guaranty subject to subsequent acceptance but rather a contemporaneous promise coupled with the mutual promises of Plaza and WRS contained in the Services Agreement. As a contemporaneous guaranty, no notice of acceptance was legally required to make it effective.

III. CONCLUSION

As the result of the forgoing, the arguments made on von Bernuth's behalf pertaining to his alleged Affirmative Defenses and the ability to assert a "recoupment" Counterclaim notwithstanding the preclusive effect of the confirmed Chapter 11 plan are without merit. Consequently, the arguments are insufficient to form a proper legal basis for the Court to grant his Petition to Set Aside a Default Judgment.

Respectfully submitted,

THOMAS E. REILLY, P.C.

BY: ____/s/ Thomas E. Reilly_______

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CERTIFICATE OF SERVICE

I, Thomas E. Reilly, Esquire, hereby certify that a true and correct copy of the Supplemental Response was delivered via U.S. Regular Mail on the _5th_ day of December, 2007 to the following:

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